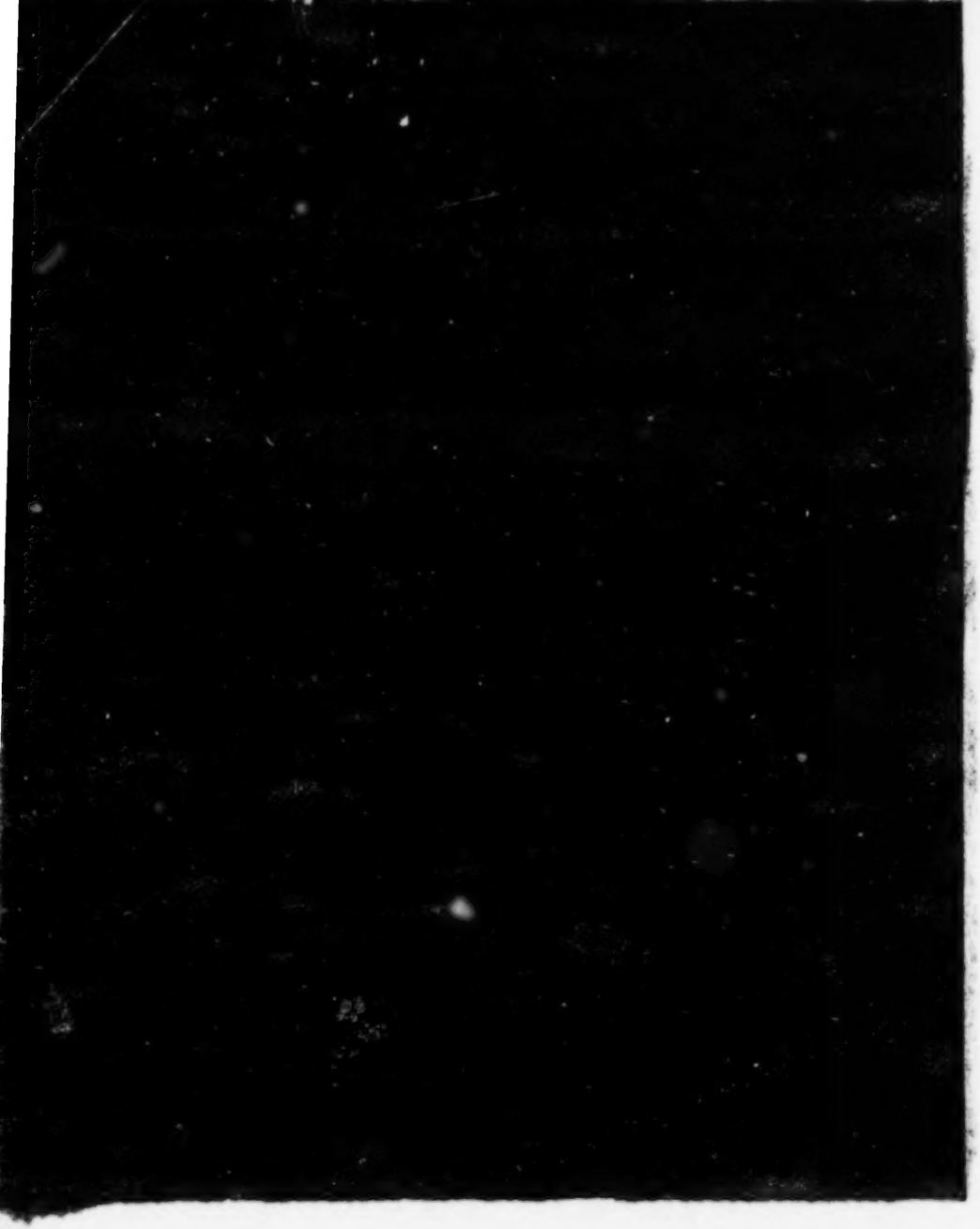

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No. 01-332

DEC 31 2001

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IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONERS

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THE CENTER FOR EDUCATION

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QUESTION PRESENTED

The question presented is whether the Tenth Circuit Court of Appeals properly determined that a board of education cannot validly exercise its judgment in an effort to deter and eliminate student drug use by enacting a suspicionless drug-testing policy covering students who voluntarily engage in interscholastic competition unless the board has first specifically identified and quantified the actual drug users among the students to be tested.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 242 F.3d 1264 (10th Cir. 2001) and is included in Appendix A to the Petition for a Writ of Certiorari at pages 1a through 45a. The court of appeals' order denying a petition for rehearing *en banc* is found at Appendix B to the Petition for a Writ of Certiorari at pages 50a through78a. The court of appeals' order granting attorney fees and costs is found at Appendix C to the Petition for Writ of Certiorari at pages 47a through 49a. The district court's opinion is reported at 115 F.Supp.2d 1281 (W.D. Okl. 2000) and is included in Appendix D to the Petition for Writ of Certiorari at pages 50a through 78a. The district court's judgment and amended judgment are found at Appendix E, page 79a and Appendix F, pages 80a and 81a to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on March 21, 2001, and denied rehearing and rehearing *en banc* on May 30, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1). Petitioners filed their Petition for a Writ of Certiorari on August 24, 2001. This Court granted the Writ of Certiorari on November 8, 2001, found at ___U.S.___, 122 S.Ct. 509 (Mem).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case arises from the adoption in September 1998 and the implementation in October 1998 of the Student Activities Drug Testing Policy ("Policy") by the Petitioner Board of Education of Independent School District No. 92 of Pottawatomie County ("Board of Education").[1] The Policy requires Tecumseh students in the seventh through twelfth grades who wish to engage in interscholastic competition to consent to urinalysis testing. High school juniors Lindsay Earls and Daniel James, through their parents, initiated this action against the Board of Education in August 1999 seeking injunctive relief and a declaratory judgment that the Policy is unconstitutional.

I. THE RECORD

A. The District.

The City of Tecumseh, Oklahoma, is located approximately forty miles southeast of Oklahoma City, Oklahoma. Any child residing within the community is entitled to receive a public education at Tecumseh. Not unlike all other public schools in the nation, the Board of Education has for many years offered its students the opportunity to participate in school-sponsored extracurricular activities. (J.A. 8).[2] A majority of its high school students participate in at least one extracurricular activity in Tecumseh. (*Id.*) Participation in all extracurricular activities provided by the Board of Education is voluntary and is open to all students who meet the requirements to participate in the activity. (J.A. 31). The requirements for each activity necessarily depend upon the activity involved and the requirements therefore.

[1] Petitioner Independent School District No. 92 of Pottawatomie County will be hereinafter referred to as "Tecumseh."

[2] References to the Joint Appendix are denoted as "J.A."; references to the record are denoted as "R."; and references to the Appendix to the Petition for a Writ of Certiorari are denoted as "Pet. App."

(J.A. 32). As examples, a student must be in or have taken a class in French in order to participate in the French Club, and the National Honor Society is only open to those students who evidence academic excellence. (J.A. 24, 25).

Some of the extracurricular activities provided by the Board of Education go beyond intradistrict fellowship and additionally offer opportunities for students to test their skills and compete against other students outside the confines of Tecumseh, Oklahoma. These activities, which will be referred to hereinafter as Competitive Activities are: Athletics,[3] Academic Team, Band, Vocal, Future Homemakers of America (FHA), Future Farmers of America (FFA), Cheerleading and Pom Pom. (J.A. 20, 21). The interscholastic competitions that students engage in when they choose to participate in Competitive Activities are not only offered by Tecumseh, but they are also offered, scheduled and regulated by the Oklahoma Schools Secondary Activities Association (OSSAA), (R., Ex. A to Defendants' Brief in Support of Motion for Summary Judgment filed November 17, 1999). Only the Competitive Activities covered under the Policy are subject to the outside governance of the OSSAA. (J.A. 104, 105).

[3] The record is silent as to the interscholastic nature of the athletic program in Tecumseh because Respondents did not challenge the practice of random drug testing for those students participating in athletics, acknowledging that it is "a practice approved by the U.S. Supreme Court." (J.A. 8). Although Respondents conceded that drug-testing of student athletes was permissible, other students (also represented by the American Civil Liberties Union) challenged the drug-testing of athletes in the case of *York v. Wahkiakum School Dist. No. 200*, Case No. 99-2-0075-6, filed in the Superior Court of Wahkiakum County, Washington in December of 1999. That case is still pending in the Superior Court, and the Plaintiffs there assert that drug-testing of athletes is unconstitutional unless the school district is able to prove that student athletes "were more likely to use drugs than the general school population or that athletes had somehow been instigating an increase in drug use." *York v. Wahkiakum School Dist. No. 200, supra*, Complaint, at ¶ 4.

B. Tecumseh's Drug Problem.

The Policy was implemented by the Board of Education to combat a student drug problem that has existed in Tecumseh since at least the 1970's and has remained a problem through the 1990's. (J.A. 100).

Dean Rogers, the current President of the Board of Education, who is also a parent and grandparent of Tecumseh students, outlined the student drug usage of which she was aware during this period of time. In the 1970's, a band student who offered another band student "pills" was seen by Mrs. Rogers acting inappropriately during a band performance. (J.A. 78). During that same period of time, Mrs. Rogers personally observed students smoking "pot" approximately three times. (J.A. 72). The Chief of Police asked her daughter to look for a certain car because he suspected drug dealing. (*Id.*). She chaperoned a dance where marijuana was found. (J.A. 99). In the late 1970's, Ms. Rogers found marijuana paraphernalia at her house left by a Tecumseh football player. (J.A. 91, 92). Parties were held in the community where marijuana was smoked by her son and fellow Tecumseh students. (J.A. 92). During the 1970's, Ms. Rogers also witnessed an injury to an adult caused by an FFA student in competition who she believed was under the influence of drugs. (J.A. 81).

In the 1980's, Mrs. Rogers was aware that her son's schoolmate was transporting marijuana and was stopped by the police. (J.A. 81, 93). The person who found a bag containing marijuana on school property during that period of time advised her of the incident. (J.A. 93, 94). Her grandson also reported to her a student with beer and another student with a marijuana cigarette at school during that period. (J.A. 94, 95).

In the early 1990's, Mrs. Rogers witnessed a second incident at a competition involving an FFA student where he lost control of his animal which she believes was caused by

drugs. This time the student was hurt. (J.A. 81, 82). During that same time, she was informed that students at a party found the marijuana "stash" of the mother of the student hostess and passed it around to other students at the party. (J.A. 95). In the 1997-98 school year, a student reported to Mrs. Rogers that students were passing a marijuana cigarette around in the classroom. (J.A. 87, 96). She also overheard an FFA student inviting other students to a party where there would be "plenty of smoke," which she understood to mean marijuana. (J.A. 96). During that same year, Mrs. Rogers' granddaughter reported to her that a boy was "bombed out" in class. (*Id.*). Marijuana was also found in a student's car during that same school year. (J.A. 98, 99).

Mrs. Rogers is not the only person to observe or be aware of drug use at Tecumseh. Danny Sterling, the FFA teacher and coach, estimates that in the last five years approximately ten of his students per year in the curricular class associated with FFA appear to be under the influence of drugs. (J.A. 120). He has occasionally overheard students in his FFA class openly talk about drug use. (J.A. 120, 121).

Carolyn Daugherty, the Vocal teacher and coach, has had students tell her other students in choir were using drugs and has observed student choir members who appear to be under the influence of drugs. (J.A. 125, 126).

Sheila Evans, the FHA coach and teacher, believes Tecumseh has a drug problem which has increased over the years, and she is amazed that in her FHA class "kids will talk about use of marijuana quite freely in class" to the extent that she must admonish them. (J.A. 115, 116).

In a period that spanned three years in the late 1990's, Julie Dawson, Russ Rutledge and Ruth Clouber, the counselors of the middle and high schools, have counseled students on numerous occasions regarding their current or past drug use, or the use of such drugs by the students' friends or parents.

(J.A. 52-56). The counselors indicated that three instances involved students in Band, and three instances involved students in Vocal. (*Id.*).

James Blue, the high school principal, has suspected drug usage by students who were brought to the office due to surveillance by the interdiction canines, based upon the odor of marijuana on their clothes and the physical appearance of those students. (J.A. 52,103). Students enrolled in Athletics, FFA, Vocal and Band in the middle school and students enrolled in high school FFA, FHA and Athletics have been caught with or disciplined for drugs. (J.A. 44). Moreover, just prior to the implementation of the Policy, members of the Board of Education began receiving phone calls from or were stopped on the street by parents and grandparents who expressed their concern about drug usage by students. (J.A. 85-88). One brave parent appeared before the Board of Education in an open meeting in February 1998 and publicly admitted her own child's drug abuse. (J.A. 86, 87). A further indication of a problem causing concern was the increase of disciplinary actions over the past five years. (J.A. 57, 64).

Respondents themselves acknowledge that in the 1996 or 1997 school year a group of eighth grade football players was accused of consuming prescription drugs, and in the following year a small quantity of marijuana was discovered in the middle school locker room (J.A. 11, 12). Respondents also conceded that during that same school year, the "drug dog" found three marijuana cigarettes near the boundary of Tecumseh's unfenced parking lot, and also hit on a student car at school within which marijuana particles and seeds were found. (R., Plaintiffs' Brief in Support of Motion for Summary Judgment filed December 28, 1999, page 16). Shortly after this lawsuit was filed, Respondent Lindsay Earls appeared on national television and advised Charlie Gibson on "Good Morning America" that a widespread drug problem existed in Tecumseh. (J.A. 108). She later testified in her deposition that she was unsure whether or not the drug

problem was widespread after conferring with her friends. (J.A. 108, 109). Moreover, Respondent Daniel James, who had been enrolled in Tecumseh a little more than eighteen months when this lawsuit was filed, had been to two or three parties where he had "physically seen about 12 people, altogether, that attend Tecumseh High School, under the influence of illegal drugs." (J.A. 123). During his limited time in Tecumseh, Respondent James also talked to twelve students about their own drug use, half of which he believed were engaged in extracurricular activities. (J.A. 122, 124). He knew of two students who had been sent to drug rehabilitation programs during the eighteen months he was enrolled in Tecumseh. (J.A. 123). Respondent James knew that Tecumseh students "who hang out at the park" adjacent to the high school "do drugs." (J.A. 124).

C. Other Measures Implemented by Tecumseh to Combat Drug Usage.

Tecumseh has attempted to deter and eliminate drug abuse by its students in numerous ways. As noted by the district court below, Tecumseh yearly observes "Red Ribbon week" during which student anti-drug rallies are held, and educational programs which utilize "victim impact" speakers and the anti-drug "Grim Reaper" program have been implemented. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F.Supp. 1281, 1286, fn. 20 (Pet. App. D 59a). A "Life Guides" program is utilized in which selected Tecumseh students counsel middle school students about drug use (J.A. 22). The Board of Education also contracts with canine contraband detection companies on a yearly basis to regularly search school property. (J.A. 102). Tecumseh has been provided a city police officer to patrol the high school during class hours (R., Pp. 190 and 193 of Deposition of James Blue, Ex. E to Defendants' Brief in Support of Motion for Summary Judgment filed November 17, 1999), and has installed surveillance cameras in the high schools. (*Id.*).

Tecumseh's efforts have failed to eliminate the drug problem among its students and, as evidenced by the increase in disciplinary actions and observations of Sheila Evans, the drug problem appeared to some to have been on the rise.

As an added tool, the Board of Education began discussing the feasibility of a drug-testing policy during the 1994-1995 school year. (J.A. 84). On August 31, 1998, the Board of Education convened a special meeting for the purpose of seeking input from the community regarding a proposed drug testing policy. (J.A. 86, 87, 136). Approximately fifty patrons appeared at the meeting (J.A. 156). At the meeting, questions were raised by the public regarding the feasibility of testing all students in the District and including all extracurricular activities. (J.A. 136, 137). However, not one patron of the community, including Respondent Lori Earls who was present, voiced disagreement with a drug testing policy. (J.A. 156). After discussion, the Board of Education determined to adopt a policy covering all interscholastic competitive activities. (J.A. 139). The Board officially voted to adopt the Policy on September 14, 1998 and the Policy was implemented on October 19, 1998. (J.A. 156).

D. The Policy.

The Policy covers all Competitive Activities offered by the Board of Education which are regulated by the OSSAA. (J.A. 105, 157). The Policy is non-punitive in nature. (J.A. 193). Although there are consequences for students who test positive under the program, no academic sanctions are imposed nor is any student subject to suspension from school as a result of a violation. (*Id.*).

For the first offense, a meeting is held with the affected student, parent, athletic director and principal. (J.A. 201). The student may continue to compete if the student agrees to drug counseling and further agrees to submit to a drug test within two weeks. (*Id.*).

If the student tests positive a second time during the school year, the student will not be permitted to engage in Competitive Activities for fourteen days. (*Id.*). By agreeing to complete four hours of substance abuse education/ counseling provided by the school and to be randomly tested for the remainder of the year, the student can return to Competitive Activities. (*Id.*). Any student who disagrees with the outcome of the test may appeal the results to the Superintendent and will be permitted to remain in his chosen Competitive Activities until the appeal is heard. (J.A., 200, 202). Moreover, a student who admits drug usage prior to notification of testing will continue to remain in Competitive Activities if the student agrees to the provisions of counseling and a two-week retest. (J.A. 202). Finally, a student who refuses the drug test or who tests positive for the third time in one school year will be prevented from engaging in Competitive Activities for the remainder of the school year or the remainder of a semester in a school year, whichever is longer. (*Id.*).[4] The reasoning behind the Board of Education's implementation of the Policy is clearly expressed:

> "Tecumseh Public Schools is committed to cooperating with parents/guardians in an effort to help students avoid illegal drug use. The Tecumseh Public School District believes accountability is a powerful tool to help some students avoid using drugs and that early detection and intervention can save lives." (J.A.202).

All students who participate in Competitive Activities are tested as part of a required annual physical for athletes or prior to participation for the non-athletic Competitive Activities. (J.A.196). Students may also be tested when

[4] Respondents argued in the district court that, by its plain reading, the Policy covers all extracurricular activities offered by the Board of Education. However, Respondents acknowledged in their initial Complaint that the Policy is not applied, and was never intended to apply, to all extra-curricular activities. (J.A. 20-25). Respondents did not raise this argument in the Tenth Circuit.

reasonable suspicion exists or if the student is chosen on a random basis to provide a sample. (*Id.*). If the student chooses to engage in Competitive Activities, both the student and the student's parents are required to sign a form consenting to all testing under the Policy. (J.A. 196, 197).

The annual and random testing screens for amphetamines, cannabinoid metabolites, cocaine, opiates, barbiturates and benzodiazepines. (J.A. 70). The suspected use of all other controlled, dangerous substances and of unauthorized or excessively used prescription drugs is tested under the reasonable-suspicion provision of the Policy. (J.A. 141).

The test specimen is collected in a "manner designed to minimize intrusiveness . . . ." (J.A. 198). The urine sample is produced by a student in "a restroom or other private facility behind a closed stall." (*Id.*). A monitor accompanies the student to the bathroom and waits outside the bathroom stall. (J.A. 199).

The sample is sent to Drugs of Abuse Testing Laboratory, Inc. in Tulsa, Oklahoma, for testing. (J.A.70). An initial positive test is confirmed by a second and different test conducted on the same specimen. (J.A. 199). Test results are kept in files separate from the student's other educational records. (J.A. 200). Positive tests are disclosed to the parent, student, principal/athletic director and the coach of the activity. Law enforcement authorities are not contacted. (J.A. 199, 200).

II. THE RULING OF THE DISTRICT COURT.

This case was filed in the United States District Court for the Western District of Oklahoma in August 1999. John and Lori Earls and Leta Hagar, the parents of Lindsay Earls and Daniel James, alleged in the Complaint that Oklahoma students have the right to a free, public education, and the right to participate in non-athletic student activities without being required to submit to suspicionless testing under the

Fourth Amendment to the United States Constitution. (J.A. 7). They sought preliminary and permanent injunctions against Tecumseh and a declaration that the Policy, only as it applies to the suspicionless testing of students engage in the enumerated non-athletic competitive activities, violates the Fourth Amendment. (J.A. 28). The allegations were based, in part, on the misperception that a violation of the Policy results in expulsion from the curricular classes associated with the competitive activity.[5] (J.A. 8, 9, 15, 16, 17, 18, 19, 28).

Being presented with cross-motions for summary judgment, the district court concluded that the Policy was constitutional and granted judgment in favor of the Board of Education.

The district court balanced the privacy interests of the students engaged in Competitive Activities against Tecumseh's need and purpose for the drug-testing program, the standard adopted by this Court in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) ("*Vernonia*"). *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F.Supp. 1281, 1283 (Pet. App. D. at 53a). The court found Tecumseh had demonstrated a "legitimate cause for concern" of substance abuse. The district court declined to interpret *Vernonia* as requiring Tecumseh to demonstrate a drug epidemic as Respondents urged, observing that "[i]t would seen rather anomalous to require school officials to await an epidemic before taking preemptory measures." *Id.*, 151 F.Supp. at 1288 (Pet. App. D at 62a). Regarding the privacy expectations of the students, students voluntarily engaged in non-athletic competitive activities were properly found by the

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[5] This misperception by Respondents was reduced at the court of appeals stage of this proceeding to a similarly misperceived allegation that Respondents would be denied the opportunity to earn the right to "extra credits" in the curricular courses associated with the Competitive Activities.

court to be regulated by more school-sponsored rules and regulations, to be subject to additional non-district rules and regulations, and to compromise their personal privacy comparable to that of athletes stating: "students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished below that of the already lowered expectation of non-participating students." *Id.*, 115 F.Supp. at 1290 (Pet. App. D at 66a). The district court concluded that the testing of students who desire to participate in interscholastic competition is a reasonable means adopted by Tecumseh in its attempts to eliminate and further deter drug use in light of the diminished privacy expectations of those students and the minimal intrusion of the collection process utilized. *Id.*, 115 F.Supp. at 1296 (Pet. App. D at 78a).

III. THE RULING OF THE COURT OF APPEALS.

Respondents appealed to the United States Court of Appeals for the Tenth Circuit which reversed the district court judgment and held the Policy unconstitutional under the Fourth Amendment. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1278 (Pet. App. A at 24a-25a). Rather than accepting the analysis utilized by the district court, the court of appeals performed its own balancing of the privacy interests of the affected students against the nature of the concern of the Board of Education. It concluded that, although students in Competitive Activities have a privacy expectation that is diminished below that of the general student population, the Board of Education had not proved a concern that was specifically tailored to the students in Competitive Activities. Finding the Board of Education's concern and purpose of deterrence to be insufficient,[6] its belief of the existence of drug usage to be "hearsay" and

[6] *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1276 (Pet. App. A at 22a).

"anecdotal,"[7] its concern for the safety of these students to be "too much and too little,"[8] and the limited supervision it can provide these students an "imperfect match" while engaging in Competitive Activities,[9] the court of appeals concluded the Policy was unconstitutional.[10] Its broad ruling applies to all school activities in all school districts within its jurisdiction:

> "Any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."[11]

SUMMARY OF ARGUMENT

Tecumseh's Policy requiring students who choose to engage in Competitive Activities to submit to suspicionless drug testing does not violate the Fourth Amendment to the United States Constitution. This Court has consistently held that the school environment presents special needs which necessitate the relaxation of the Fourth Amendment requirements of the issuance of a warrant based on probable cause.

Tecumseh has the authority and responsibility, as the tutor and guardian of its students, to ensure that the health and safety of its children are safeguarded at all times while they are in the custody of school officials. *Vernonia, supra.*

In particular, the suspicionless drug testing of students engaged in interscholastic athletics has been upheld on the

[7] *Id.*, 242 F.3d at 1274 (Pet. App. A at 17a).

[8] *Id.*, 242 F.3d at 1277 (Pet. App. A at 23a).

[9] *Id.*, 242 F.3d at 1277 (Pet. App. A at 24a).

[10] *Id.*, 242 F.3d at 1278 (Pet. App. A at 25a).

[11] *Id.*

basis that the governmental interest in deterring and eliminating drug use by its children outweigh the diminished privacy interests of students who voluntarily choose to engage in athletic activities which require heightened regulations and privacy intrusions than to which the general student population is subject.

Like athletes, students who engage in non-athletic competitive activities voluntarily choose to abide by heightened regulations and agree to submit to additional privacy intrusions than do students in the general school setting. Moreover, these students spend longer hours in the custody of the school officials, either practicing after school or on weekends, or traveling to different towns, cities and states to compete, where direct supervision by Tecumseh personnel is limited.

The Policy has as its purpose and goal to deter drug use and obtain treatment for those students who use drugs. The Board of Education has reasonably determined that there is a drug problem among its students that warrants the implementation of the Policy. Such determination by the Board of Education to implement the Policy directed at students engaged in Competitive Activities is a proper exercise of its considered judgment and is therefore constitutional.

ARGUMENT

I. THE NATURE OF THE SCHOOL ENVIRONMENT IS RECOGNIZED AS ONE WHICH REQUIRES A RELAXATION OF RIGHTS AFFORDED BY THE U. S. CONSTITUTION

As early as 1953, this Court recognized that the education of our children "is perhaps the most important function of state and local governments." *Brown v. Bd. of Education*, 347 U.S. 483, 493 (1954) ("*Brown*").

In *Brown*, this Court emphasized:

> "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.*

In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), this Court acknowledged that courts cannot intervene in the resolution of conflicts in the daily operation of schools unless basic constitutional rights are "directly and sharply" implicated.

Although recognizing that students do not "shed their constitutional rights . . . at the schoolhouse gate," this Court shortly thereafter affirmed the *Epperson* reasoning that school officials have the comprehensive authority "to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969).

This Court understands that "[e]ven in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *New Jersey v. TLO*, 469 U.S. 325, 339 (1985) ("*TLO*").

Special care has been taken to understand the unique and unusual situation in which educators and their governing boards are placed because "[t]he system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

Although educators are government actors, this Court's sensitivity to their situation exists because:

> "[L]ocal control of education involves democracy in a microcosm. In most public schools in the United States the parents have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.' A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion . . . ." *Board of Educ., Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 583, 891 (1982) (Burger, C.J., dissenting).

Based on this understanding, this Court consistently finds that the full panoply of constitutional rights do not apply with the same force and effect to students in the school environment as it does to adults in general. *Goss v. Lopez*, 419 U.S. 565, 591 (1975) ("*Goss*").

In *Goss*, this Court first held that students facing a short-term deprivation of their property right to an education are entitled to only the "rudimentary" protections of the Due Process Clause of the Fourteenth Amendment, without the benefit of counsel and the rights of confrontation, cross-examination, and the presentation of witnesses. *Id.* at 583. This Court acknowledged the dilemma in which school officials are placed because they "frequently act on the reports and advice of others." *Id.* at 580.

In *Ingraham v. Wright*, 430 U.S. 651, 671 (1977), this Court held that the Eighth Amendment to the United States Constitution which protects citizens against cruel and unusual punishment is inapplicable to teachers or administrators, as government actors, who impose disciplinary corporal punishment on students. This Court further found that students are

not constitutionally entitled to notice or a hearing prior to the imposition of such punishment because such a process would "require time, personnel and a diversion of attention from normal school pursuits." *Id.* at 681.

More recently in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), this Court recognized that First Amendment rights of students "are not automatically coextensive with the rights of adults in other settings . . . and must be applied in light of the special characteristics of the school environment." (*Id.* at 266). Although not legally obscene, educators are permitted to restrain speech which is "wholly inconsistent with the fundamental values of public school education" and "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board [citation omitted] rather than the federal courts." *Id.* at 267.

The relaxation of the requirements of the Fourth Amendment in the school setting, which is the subject of this action, is fully explained below.

II. A RELAXATION OF RIGHTS AFFORDED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Searches Based on Individualized Suspicion in a Special Needs Environment.

The Fourth Amendment to the United States Constitution provides our nation with the constitutional right to privacy. "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *TLO*, *supra*, 469 U.S. at 335.

In *TLO*, this Court created an exception to the warrant and probable cause requirements of the Fourth Amendment for school officials.

T.L.O., at the time a 14-year-old student, and another student were found smoking in the school bathroom. The teacher who discovered the school infraction brought T.L.O. and her companion to the principal's office. Upon questioning by the assistant principal, T.L.O.'s companion admitted the infraction; however T.L.O. not only denied the alleged bathroom incident, but denied that she smoked. The assistant principal conducted a search of T.L.O.'s purse based solely upon the report of the teacher. The search of T.L.O.'s purse not only yielded a pack of cigarettes, but cigarette rolling papers, a pipe, a number of empty plastic bags, marijuana, a large amount of money, a list of students who owed T.L.O. money, and letters that implicated her in drug dealing. *Id.* at 328. The New Jersey Supreme Court ruled that the search of T.L.O. was unreasonable, and hence unconstitutional, partly because the assistant principal had not been furnished specific information to suspect that T.L.O.'s purse would contain cigarettes. *Id.* at 331.

This Court had little trouble determining that a school search is covered by the Fourth Amendment. *Id.* at 337. First and foremost and consistent with its first phrase of the Amendment, the Fourth Amendment permits only those searches that are reasonable. This Court affirmed the earlier standard it developed to determine the reasonableness of a search by "balancing the need for the search against the invasion which the search entails." *Id.*, citing *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967).

The balancing test conducted by this Court was not directed specifically at T.L.O. and the need of the assistant principal to conduct the search. Rather, the Court balanced the interest of students, in general, to bring to school personal private items such as keys, money, items of personal hygiene, photographs and diaries against the general "substantial interest of teachers and administrators in maintaining

discipline in the classroom and on school grounds," coupled with the fact that drug usage among students had become a major social problem. *TLO, supra*, 469 U.S. at 339.

This Court then turned to the second phrase of the Fourth Amendment which traditionally defines a reasonable search, *i.e.*, the issuance of a warrant based on probable cause. By weighing both the students' interest in privacy against the educators' substantial interest in maintaining order, this Court dispensed with the warrant requirement finding it "unsuited to the school environment" because "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Id.* at 340. This Court further found that school officials were not required to adhere to the strict standard of probable cause and modified the standard to "depend simply on the reasonableness, under all the circumstances, of the search." *Id.* at 341.

The specific search of T.L.O. was then reviewed by the use of the reasonableness standard. This Court noted that the state court viewed the information the assistant principal relied upon to determine a search was justified was "at best . . . 'a good hunch'" that cigarettes might be found in her purse. *Id.* at 344-345. However, this Court recognized such information was "the sort of 'common sense conclusion about human behavior' upon which 'practical people'—including government officials—are entitled to rely." *Id.* at 346, citing *United States v. Cortez*, 449 U.S. 411, 418.

TLO emphasized "the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in the nonschool setting."[12] The "special relationship between teacher and student,"[13] a school's

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[12] *TLO, supra*, 469 U.S. at 348 (Powell, J., concurring).

[13] *Id.* at 349 (Powell, J., concurring).

"obligation to protect pupils," [14] and "because drug use and possession of weapons have become increasingly common among young people," [15] mandate the relaxation of the Fourth Amendment's requirement of a warrant based on probable cause to the requirement of simple reasonableness. Justice Blackmun, in his concurring opinion, originated the concept of "special needs" to explain this necessary relaxation of the Fourth Amendment in the school setting.[16] The standard adopted by the *TLO* Court to determine if the search of a student is reasonable ("the individualized suspicion standard") is (1) whether the action was justified at its inception and (2) whether the search was reasonably related in scope to the circumstances which justified the interference in the first place. *TLO, supra*, 469 U.S. at 341.

However, this Court noted this standard did not necessarily extend to suspicionless searches, stating:

> "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' *Delaware v. Prouse*, 440 U.S. 648, 654-655, 99 S.Ct. 1391, 1396-1397, 59 L.Ed.2d 660 (1979) (citation omitted)." *TLO, supra*, 469 U.S. at 342, footnote 8.

Since that ruling and prior to *Vernonia*, both the special needs doctrine and the individualized suspicion standard have been applied to the government as an employer to search an individual employee's desk in *O'Connor v. Ortega*, 480 U.S. 709 (1987). This Court found the "special needs" of the public government office environment required a relaxation

[14] *Id.* at 350 (Powell, J., concurring).

[15] *Id.* at 352-353 (Blackmun, J., concurring).

[16] *Id.* at 352 (Blackmun, J., concurring).

of the warrant and probable cause requirements of the Fourth Amendment. *Id.* at 422-425. This Court, however, remanded the case to the district court because of its failure to determine "the justification for the search" and "the reasonableness of the search and scope."

The special needs doctrine and the individualized suspicion standard was again utilized for a search of an apartment of an individual on probation in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). This Court found that "[s]upervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Id.* at 876. The search in *Griffin* met the individualized suspicion standard based on secondhand information from a police detective to a probation supervisor that "there were or might be guns"[17] in the apartment, *i.e.*, the search was justified at its inception based on common sense reasonableness and related in scope to the circumstances.

B. Suspicionless Searches in Non-School "Special Needs" Environments.

In *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989) ("*Skinner*"), the standard to apply for the suspicionless searches of adult railroad workers was at issue. The Federal Railroad Administration implemented the program based on information collected that indicated railroad employees generally engaged in frequent drug and alcohol use. This Court first employed the "special needs doctrine" and found that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, 'likewise presents special needs' beyond law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 620. This Court reit-

[17] *Griffin v. Wisconsin, supra*, 483 U.S. at 871.

erated its recognition in *TLO* "that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Id.* at 624.

Individualized suspicion is not required "where the privacy interests implicated by the search are minimal, and where the governmental interest furthered by the intrusion would be placed in jeopardy by the standard of individualized suspicion." *Id.* The railroad employees were found to have a diminished privacy interest "by reason of their participation in an industry that is regulated pervasively to ensure safety." *Id.* at 627. This diminished expectation of privacy was weighed against the government's important interest in identifying and deterring drug use among those adults who are employed in safety-sensitive positions. *Id.* at 633. The scale was balanced in favor of the government.

Thus, the test for searches not based on individualized suspicion emerging from *Skinner* is to first determine if the environment presents a special need to dispense with the warrant and probable cause requirements of the Fourth Amendment and, if so, to balance the privacy interests of the individuals in question against the governmental purpose and interest involved.

The special needs/balancing test was utilized in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) ("*Von Raab*"), a case involving a suspicionless drug testing program implemented by the government as an employer. The sole purposes of the program, which were to "deter drug use among those eligible for promotions to safety sensitive positions within the (Customs) Service and to prevent the promotion of drug users to those positions" were found by this Court to sustain a special need to dispense with a warrant and probable cause. *Id.* at 666. Although the Commissioner of Customs admitted the Service was "largely" drug-free, this Court found the employees to have diminished expectations of privacy due to the nature of their position, and "cannot

reasonably expect to keep from the Service personal information that bears directly on their fitness." *Id.* at 472. On the other side of the scale, the government interest in "ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment" (*Id.* at 670), and the public interest which "demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry firearms, even if the incumbent is not engaged directly in the interdiction of drugs" (*Id.*), balanced the scale in favor of the government to justify the suspicionless drug testing program for those employees.

In both lower courts, Respondents vehemently argued that this Court's more recent decision in *Chandler v. Miller*, 520 U.S. 305 (1997) ("*Chandler*") was the controlling case to determine the constitutionality of Tecumseh's Policy. Both lower courts declined to agree with Respondents.

Chandler addressed the constitutionality of a Georgia statute requiring all candidates for a large array of public offices to undergo a one-time suspicionless drug test at a time and date designated by the candidate. Under the challenged law, the candidate was banned from nomination or election for failure to obtain a positive drug test. *Id.* at 312.

The State of Georgia "readily acknowledged" that it had no evidence of "any fear or suspicion" of drug use to prompt the adopt of the legislation. *Id.* at 319. The sole purpose of the statute was to "deter unlawful drug users from becoming candidates and thus stop them from attaining high state office." *Id.* at 318. Relying on *Skinner*, *Von Raab* and the *Vernonia* decision discussed below, this Court reaffirmed the need of the government to be "important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318. In the absence of any evidence of drug use, coupled with the fact that the

statute was "not well designed"[18] to identify drug users or deter drug users from seeking office, this Court found no basis to support the statute, noting that fostering an image of drug-free candidates was not enough to demonstrate the necessity for such procedure.

This Court applied the "special needs" test again earlier this year in *Ferguson v. Charleston*, 532 U.S. 67, 121 S.Ct. 1281 (2001) ("*Ferguson*"). This Court noted that "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification. *Id.*, 121 S.Ct. at 1287, footnote 7. Finding the central feature of the suspicionless drug-testing policy of the City of Charleston to be "the use of law enforcement to coerce the patients into substance abuse treatment"[19] or face arrest, this Court struck the program as violative of the Fourth Amendment.

The Court noted, however:

> "The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties." *Id.*, 121 S.Ct. at 1288, footnote 12.

C. Searches Not Based On Individual Suspicion In the "Special Needs" School Environment.

Subsequent to *Von Raab* and *Skinner*, but prior to *Chandler* and *Ferguson*, this Court returned to the school setting to consider suspicionless searches of students in *Vernonia*. The challenged policy required the suspicionless drug testing for all students wishing to participate in athletics. The purpose of

[18] *Chandler, supra*, 520 U.S. at 319.

[19] *Ferguson, supra*, 121 S.Ct. at 1290.

the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with an assistance program." *Vernonia, supra*, 515 U.S. at 650. The program tested for amphetamines, cocaine and marijuana. Approximately 60-65% of secondary students and 75% of elementary students participated in athletics in Vernonia and were subject to the program. *Acton v. Vernonia*, 796 F. Supp. 1354, 1356, (D. Or., 1992).

No evidence of actual use of amphetamines, cocaine or marijuana on school grounds by either the student population generally or student athletes specifically was presented to this Court. Rather, the testimony at trial in the district court came from teachers who overheard the student body, in general, boasting about the use of "drugs," and who were facing profane, rude and obscene language in the class. One instance of a teacher observing students using drugs off school property was offered. *Id.* There was also testimony by the administrators who were experiencing an unusual increase in disciplinary referrals in the general student population and who had a "perception," confirmed by the perceptions of parents and students, that those problems were caused by "substance" abuse. *Id.* at 1357. The athletes were not insulated from the perceived substance problem. Although no athlete was caught or observed at school in possession of amphetamines, cocaine or marijuana,[20] some athletes had consumed alcohol on a bus, and a wrestling coach smelled the odor of marijuana in the hotel room the day after an athlete was injured in a competition. *Id.* The coach further testified that the injury to the wrestler and safety omissions and misexecutions by football players fostered his "belief" that athletes did drugs. *Vernonia, supra*, 515 U.S. at 649.

[20] Although not mentioned in any of the *Vernonia* opinions, during the three years the drug-testing policy was in effect there only two students tested positive for drug use. Respondent's Brief at 7, *Vernonia, supra*, (No. 94-590) (filed February, 1995).

This Court reiterated in *Vernonia* that the "special needs" of the general school setting requires school officials to have greater flexibility under the Fourth Amendment because a warrant based on probable cause would "undercut" the substantial need of freedom for school officials to maintain order in the schools. *Id.* at 653.

Finding already existing special needs in the school setting, the *Skinner* and *Von Raab* balancing test was utilized by weighing the privacy interests involved against the nature of the governmental concern.

On the privacy side, students in general are subjected to a greater degree of control and supervision by school officials, who act as their guardians and schoolmasters. Students are placed by their parents in the temporary custody of the school officials who, for many purposes, act in *loco parentis*. *Id.* at 654. This tutorial and custodial nature coupled with the usual physical examinations and vaccinations required of students, led this Court to affirm that "students within the school environment have a lesser expectation of privacy than members of the population generally." *Id.* at 657.

Student athletes were found to have even less legitimate privacy expectations than the general student population, first, because of the element of communal undress involved in athletics. Athletes require "suiting up" before each practice or competition, and afterwards shower and change in the locker room. *Id.* Secondly, by "going out for the team," the athletes voluntarily subject themselves to a degree of regulation even greater than imposed on the general student population. *Id.* They submit to a pre-season physical exam, acquire or waive insurance, maintain academic eligibility, and comply with rules of conduct, dress, and scheduling dictated by their coaches. *Id.* This Court analogized athletes who voluntarily participate in sports to adults who choose to

participate in a closely regulated industry to similarly "have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*

The character of the privacy intrusion was likewise held negligible where fully clothed male students produce the sample at a urinal with an adult observer standing behind and fully clothed female students produce samples in a stall with a monitor outside the stall. This Court found "[t]hese conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily." *Id.* at 658. Furthermore, the invasion of privacy is also insignificant by a process where only certain drugs are tested, where the results are disclosed to a limited number of personnel, and where the possibility of advance disclosure of medications the students were taking exists. *Id.* at 658-660.

Finding the legitimate privacy interests of student athletes to be minimal, this Court turned to the nature of the concern expressed by the school officials in drug testing its athletics. This Court refused to describe the interest required under the Fourth Amendment to justify such searches as "a fixed, minimum quantum of governmental concern." *Id.* at 661. The interest of the officials, instead, must be "an interest which appears *important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.* (Emphasis supplied by the Court.)

The profound nature of the concern of school officials to deter drug use among the children under their care was aptly recognized by this Court:

> "That the nature of the concern is important-indeed, perhaps compelling-can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the

> Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab, supra*, 489 U.S., at 668, 109 S.Ct., at 1392, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner, supra*, at 682, 109 S.Ct., at 1419. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Vernonia, supra*, 515 U.S. at 661-662.

Finally, this Court found immediacy of the governmental concern present based on the evidence of drug use, noting however that in both *Skinner* and *Von Raab*, no such evidence was presented. *Id.* at 663.

This Court began and ended the reasoning in *Vernonia* by noting that "[c]entral, in our view" and the "most significant element" in the case is the policy was implemented in furtherance of the government's role as guardian, tutor and schoolmaster to children placed in its custody by parents. *Id.* at 654 and 665 The majority opinion concluded by acknowledging the "judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances." *Id.* at 665.

Since *Vernonia*, three federal circuits have addressed the suspicionless testing of students. Notwithstanding the ruling by the Tenth Circuit at issue here, the remaining two circuits

have addressed drug testing policies much more expansive than Tecumseh's Policy and recognize a school district's authority and duty to conduct suspicionless drug testing.

In *Todd v. Rush*, 133 F.3d 984 (7th Cir. 1998) (rehearing and suggestion for rehearing *en banc* denied, 139 F.3d 571 (1998)) (cert. denied 525 U.S. 824 (1998)), the Seventh Circuit reviewed the constitutionality of that part of a drug testing policy that applies to all extra-curricular activities. Under the policy, if the student tests positive, the student is barred from participating in any extra-curricular activities until the student subsequently produces a negative test. No evidence was presented to the court that those students involved in extra-curricular activities were the cause of the drug problem in the school district.

The Seventh Circuit heavily relied on the *Vernonia* decision and its earlier decision in *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988). The suspicionless testing policy was found to be implemented in "furtherance of the school districts' responsibilities, under a public school system, as guardian and tutor of children entrusted to its care," and further held that deterring drug use by students is a compelling interest of the state. *Todd v. Rush, supra*, 133 F.3d at 986.

The court found little difference in the testing of athletes than testing students in other extra-curricular activities:

> "Certainly successful extracurricular activities require healthy students. . . .
>
> "Additionally, while recognizing that extracurricular activities 'are considered valuable to the school experience, and [that] participation may assist a student in getting into college,' the district judge noted that extracurricular activities, like athletics, 'are a privilege at the High School' (Op.9). In *Schaill*, this Court found significant 'the fact that [the] plaintiffs are required to submit to random drug testing only as a condition of

participation in an extracurricular activity,' in that case athletics. *Schaill*, 864 F.2d at 1319. *Similar to Schaill* and *Vernonia*, the Rush County Schools' drug testing program applies only to students who have voluntarily chosen to participate in an activity. As the district court also noted, students in other extracurricular activities, like athletes, 'can take leadership roles in the school community and serve as an example to others' (Op. 14). As this Court has reasoned, '[p]articipation in inter-scholastic athletics is a benefit carrying with it enhanced prestige and status in the student community' and thus '[i]t is not unreasonable to couple these benefits with an obligation to undergo drug testing.' *Schaill*, 864 F.2d at 1320. Therefore it is appropriate to include students who participate in extra-curricular activities in the drug testing." *Todd v. Rush, supra*, 133 F.3d at 986.

The Eighth Circuit has also examined the constitutionality of a student drug testing policy which was much more expansive than Tecumseh's Policy. In *Miller v. Wilkes*, 172 F.3d 574 (8th Cir.1999) *(vacated on other grounds)* (*"Miller"*), the policy at issue covered students involved in any activity outside the regular school curriculum, such as the Rodeo Club, school dances and the prom committee. The Eighth Circuit, like the Seventh Circuit, found little difference between the privilege of voluntarily participating in athletics and the privilege of voluntarily participating in any other after-school activity. Although the school presented no evidence of any drug problem in the district, the court of appeals recognized that a school need not wait for a demonstrable problem to occur before implementing pre-ventative testing measures:

> "Drug and alcohol abuse in public schools is a serious social problem today in every part of the country. (Indeed, to the extent any party thinks it necessary to do so, we take judicial notice of that fact. See Fed.R.Evid. 201 (generally known fact).) Perhaps no public school is

> safe from the scourge of drug and alcohol abuse among its students, and it is in the public interest to endeavor to avert the potential for damage, both to students who abuse and to those students, teachers, family members, and others who are collaterally affected by the abuse, before the problem gains a foothold. Even though no harm evidently is yet quantifiable in the Cave City schools, we conclude that 'the possible harm against which the [School District] seeks to guard is substantial.' *Von Raab*, 489 U.S. at 674-75, 109 S.Ct. 1384 *(emphasis added)*. We see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of 'rebellion' proven in Vernonia, 'one fueled by alcohol and drug abuse as well as the student's [*sic*] misperceptions about the drug culture.' *Acton v. Vernonia Sch. Dist. 47J*, 796 F.Supp. 1354, 1357 (D. Or. 1992) *(subsequent history omitted), quoted in Vernonia*, 515 U.S. at 663, 115 S.Ct. 2386. Demonstrating a drug or alcohol problem the severity of which approaches that endured by the Vernonia schools certainly 'would shore up an assertion of special need for a suspicionless general search program.' *Chandler*, 117 S.Ct. at 1303. But we conclude that, given the compelling state interest in discouraging drug and alcohol abuse, and also given the considerable risk of immediate harm once the problem surfaces, the 'nature and immediacy' of the governmental concern provides strong support for the random testing policy at issue in this case. *See Von Raab*, 489 U.S. at 675 n. 3, 109 S.Ct. 1384 (It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.)." *Miller, supra*, 172 F.2d at 580.

Even though the Policy at issue here is more circumscribed than the policies in *Todd* or *Miller*, nevertheless it is within

the District's power and authority, in its role as guardian, to determine when its concern for the safety of its children is important enough to implement a drug testing policy.

Since *Vernonia*, two other federal circuits have addressed the special needs of the school environment as it relates to the Fourth Amendment protections of adult employees.

In *Knox County Educ. v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998) *(cert. den'd.* 528 U.S. 812 (1999)) ("*Knox*") the subject drug-testing policy required suspicionless drug testing for all employees or applicants applying for, transferred to or promoted to "safety-sensitive positions." A safety-sensitive position under the policy included principals, assistant principals, teachers, traveling teachers, teacher aids, substitute teachers, school secretaries and school bus drivers. The Sixth Circuit acknowledged those positions as "safety-sensitive" because those individuals are "entrusted with young children for a prolonged period of time on a daily basis." *Knox, supra,* 158 F.3d at 378. School employees "serve in an *in loco parentis* capacity and are charged with the responsibility 'to secure order and to protect students from harm while in their custody.'" *Id.* at 375. The special needs of the school environment was readily recognized by the Court:

> "We can imagine few governmental interests more important to a community than that of insuring the safety and security of its children while they are entrusted to the care of teachers and administration." *Id.* at 374.

Considering the nature of the school environment, the Sixth Circuit approved the suspicionless drug testing of school employees and applicants, even though no evidence of a drug problem among employees or harm to students by employees under the influence of drugs was demonstrated, stating "we do not believe that the Board must wait passively for a disaster to occur before taking preemptive action to

minimize the risks of such occurrence." *Id.* at 379. To the same effect is the Fifth Circuit's opinion in *Aubrey v. School Board of Lafayette Parrish*, 148 F.3d 559 (5th Cir. 1998).

Undoubtedly, suspicionless drug testing in the school environment poses a different situation where school officials "are faced with pervasive drug use in our schools" *Knox, supra,* 158 F.3d at 375, than the public office situation addressed in *Chandler* or the hospital/law enforcement collaboration in *Ferguson.*

III. THE DISTRICT'S DRUG TESTING POLICY IS CONSTITUTIONAL

Based on *TLO* and *Vernonia*, it is uncontradicted and undisputed that Tecumseh, by its very nature as a public school, necessitates the relaxation of the Fourth Amendment requirement of the issuance of a warrant based on probable cause to conduct a search. This special need exists because these school officials are the guardians, tutors and schoolmasters of the children of Tecumseh residents who have placed their children in the temporary custody of the officials. The residents of Tecumseh expect and demand these officials to maintain order and to protect their children from danger. Since the issue at hand is the suspicionless search of a segment of the Tecumseh student population, the reasonableness of this search is determined by balancing the privacy interests of the affected students against the nature and immediacy of Tecumseh's concern and the efficacy of the means utilized to address the concern.

A. The Legitimate Expectation of Students Engaged in Interscholastic Competition is Diminished to a Greater Degree Than the Already Diminished Privacy Expectations of the General Student Body.

The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes

as legitimate. *Vernonia, supra*, 515 U.S. at 654, citing *TLO, supra*, 469 U.S. at 338.

TLO and *Vernonia* have solidified the doctrine that all children enrolled in the District and all other public school districts have a lesser legitimate expectation of privacy than the general adult population by virtue of their status as students. Whether or not this lessened privacy interest, standing alone, is sufficiently diminished to permit suspicionless drug testing of the entire student population was not addressed in *Vernonia* and is not at issue here, since the policy is directed to only eight of the numerous student activities offered students by the Board of Education.

The students who participate in Competitive Activities voluntarily do so. In order to compete with other school districts, or in state, regional and national competitions, the students who engage in these activities travel to other towns, cities and states. As revealed by Respondent Earls, such trips have lasted up to four or five days. (J.A. 111, 113). At times, these students have been required to sleep with forty-to-fifty other students in a one-room dormitory setting with only public-like restroom facilities available for dressing and undressing. (J.A. 109-111). On other trips, some more modest students have ingenuously discovered how to disrobe in and out of their choir uniforms on a school bus full of other students. (R., Ex. A, Deposition of Carolyn Daugherty, p. 56, to Volume I of Plaintiffs' Appendix regarding Motion for Summary Judgment filed December 28, 1999). The Competitive Activities at Tecumseh "are not for the bashful." *Vernonia, supra*, 515 U.S. at 657.

The court of appeals declined to give this aspect of privacy "much" weight in its balancing of the interests at stake in this case, doubting that this Court in *Vernonia* intended the privacy interest of a student to be dependent upon the degree to which these students are willing to "dress or shower together or, on occasion, share sleeping or bathroom facilities

while on occasional out-of-town trips." *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1275 (Pet. App. A 20a.) While it may be true that this Court did not base its finding of a further diminished legitimate expectation of privacy in *Vernonia* solely on the **degree** of undress of athletes, the fact that there was "an element of communal undress" certainly was an important factor utilized to weigh the legitimate expectation of privacy of the athletes in question who already have diminished privacy interests due to their very status as students. *Vernonia, supra*, 515 U.S. at 657. The reality is that students who engage in Competitive Activities have a more diminished legitimate expectation of privacy due to the element of communal undress involved in those activities.

Furthermore, all students who engage in Competitive Activities, like athletes, "go out for the team" and "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id.* Students engaged in Competitive Activities "agree to follow the directives and adhere to the rules set out by the coach or other director of the activity." *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1276 (Pet. App. A 21a.). One such rule, required by choir coach Carolyn Daugherty, is that students who wish to compete in a choir event that requires an overnight stay must submit proof of and the identification of medical insurance, their social security number, parental emergency contact and a list of any prescription drugs they are currently taking in the event of an emergency. (J.A. 132). Ms. Daugherty has had occasion to use this information in a hospital emergency room with a student while on an overnight trip. (J.A. 133).

Moreover, while all students are required to abide by the rules of conduct promulgated by the school district, students engaged in Competitive Activities additionally, and voluntarily, subject themselves to the rules and regulations of the OSSAA, a state-wide and non-district organization that

regulates competition. (J.A. 105). Under these regulations, the OSSAA has the power to deem a student ineligible "whose conduct or character outside the school is such to reflect discredit upon the school" and may disqualify a student from further competition for a violation of the game rules developed by the OSSAA. (J.A. 194; R., Exhibit A to Defendants' Brief in Support of Motion for Summary Judgment filed November 17, 1999).

The court of appeals weighed this additional regulation only "in some small way" in its balancing of the interests at stake in this case. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1276 (Pet. App. A 21a). To the contrary, this Court has found these types of regulations provide expectations of privacy intrusions of athletes as another important factor to weigh and which further reduces the legitimate expectation of privacy due to their very status as students. *Vernonia*, supra, 515 U.S. at 657. Similar to the athletes in *Vernonia*, students in Competitive Activities can be analogized to adults who choose to participate in "a closely regulated industry" and who have "reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*

B. The Character of the Privacy Intrusion is Not Significant.

In *Vernonia*, the student entered a locker room accompanied by a monitor of the same sex. The male student produced his sample in an open urinal with his back to the monitor, who may or may not have watched the student urinate while listening for the normal sounds of urination. Female students produced their samples in an enclosed stall, where the monitor could hear but not observe the collection. Students then gave their sample to the monitor who checked it for temperature and tampering and transferred the sample to a vial. The vial was then shipped to the drug testing laboratory for testing. *Id.* at 650.

In this case, Tecumseh students are directed to an on-site facility where they are individually escorted to a restroom by a monitor of the same sex. Both male and female students produce their urine samples in the privacy of closed bathroom stalls while the monitor waits outside the stall. Once the sample is produced, the monitor places the specimen in two separate plastic vials and seals the vials in the presence of the student. The vials are then shipped to the drug testing laboratory in Tulsa, Oklahoma. (J.A. 70). Moreover, the urine collected is only tested for drugs, not for any medical condition, and the results are disclosed to a limited number of personnel.

Tecumseh's procedure for urine collection for female students is identical to the one utilized in *Vernonia* and is much more private than the procedure utilized for its male students. On this issue of privacy, even the court of appeals agreed that "the invasion of privacy was not significant." *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1276 (Pet. App. A 22a).

C. The Nature of Tecumseh's Concern is Important Enough to Justify Suspicionless Drug Testing.

The nature of Tecumseh's concern which resulted in the implementation of the Policy is the same concern expressed in *Vernonia*. As guardians of school children for a major part of their waking hours, preventing, eliminating and deterring drug use is a significant responsibility of board members, administrators and teachers in order to maintain an orderly and safe school. The test here is whether or not Tecumseh's officials have an interest which appears important enough to justify the suspicionless searches of students participating in Competitive Activities, in light of the fact that the searches are not significantly intrusive upon the genuine expectation of

privacy of competitive students that is reduced below the already diminished privacy expectations of the general student population. *Vernonia, supra*, 515 U.S. at 661.

As stated previously, this Court in *Vernonia* had little difficulty determining that the overall nature of the State's interest in deterring drug use by students is not only important but perhaps compelling. *Id.* The nature of this interest is magnified when state actors are public school officials who have children in their custody "for whom it has undertaken a special responsibility of care and direction." *Id.* at 662. Finally, a program tailored toward a group of students where a concern for safety is present will be an even greater justification for a search. *Id.*

Once again, whether the overall nature of the State's interest in deterring drug use standing alone is sufficient to justify a suspicionless drug testing program covering the general student population was not addressed in *Vernonia*, and is not at issue here.

The Statement of the Case evidences the history of known drug abuse among Tecumseh students. In both lower courts, Respondents characterized the District's drug problem as *de minimus*. Moreover, Respondents sought in the lower court to exclude all of the evidence presented by the President of the Board of Education, teachers and administrators, except the confirmed positive drug tests and the direct observation by a school official of marijuana in a student's car, on the basis that this evidence is legally inadmissible hearsay. (R., Plaintiffs' Motion In Limine re: Hearsay Evidence of Drug Use And Memorandum of Points and Authorities in Support, filed March 1, 2000).

Respondents objected to this evidence because it "relies on the observations of individuals who have not been identified and who will not testify at trial. Rather, the trial witnesses (or documents) report the statements of absent declarants. This is classic, inadmissible evidence." (*Id.* at page 7). Respondents' objection is motivated by their own admission that the type of evidence presented by the officials "paints a far worse picture of drug use than can be sustained through admissible, verifiable evidence." (*Id.*, at page 8).

Drug use by students in Tecumseh is not a new or recent problem. Substance abuse among its students has been endured by board members, administrators and teachers for a very long time.

The history of Tecumseh's and its drug problem has been told by no one better than the current President of the Board of Education. While attending Tecumseh as a student, she observed students smoking marijuana at school. (J.A. 72). Her daughter, who was attending Tecumseh at the same time, also advised her of drug use. (J.A. 78). She has knowledge of drug use through her son, who has been a substance abuser. (J.A. 92). Throughout the years, Ms. Rogers has been actively involved in student activities and has held offices in the Tecumseh Band Booster Club, the FFA, the Junior High Athletic Booster Club and the High School Athletic Booster Club. (J.A. 90). While attending competitive events, she has witnessed injuries caused by students under the influence of drugs, the last of which occurred in 1991. (J.A. 81, 82). She was elected to the District Board in 1993 and became its President in 1996. (R., Exhibit D, Deposition of Dean Rogers, p. 12, to Defendants' Response in Opposition to Motion for Summary Judgment filed December 28, 1999).

Her grandchildren now attend Tecumseh. They have reported seeing marijuana abuse and a student under the influence of drugs in school. (J.A. 87, 95). Other students' parents and grandparents have also called her to tell her that drugs are present in Tecumseh. (J.A. 85).

Ms. Rogers' knowledge of substance abuse; the pleas to the Board of Education by parents who know their children are using drugs; the open statements made by students in class in

front of their teachers concerning and supporting drug use; administrators' and teachers' observations and knowledge of the odor and comportment of children who have taken drugs; students who have gone through drug rehabilitation programs; the "hits" by the drug dogs; the findings of drugs on the school campus; and the school counselors who were listening to students talk about their drug use and drug use of other students, establish a legitimate cause for concern of drug abuse. This information in the hands of the school officials clearly represents "the sort of common sense conclusion about human behavior upon which practical people—including government officials—are entitled to rely" that a drug problem exists in the Tecumseh school system. *TLO*, *supra*, 469 U.S. at 346. By virtue of their own testimony, Respondents Lindsay Earls and Daniel James admit a drug problem is present in Tecumseh.

Although Respondents may be technically correct that the majority of the evidence brought forth by the school officials is hearsay, in the school setting this Court has consistently held that "a teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker." *Id.* at 353 (Blackmun, J., concurring). The standard by which these school officials determined that a drug problem exists in Tecumseh is in conformity with the standard of which this Court explained "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 343. In this case, reason and common sense leads the Board of Education to the only logical conclusion—a drug problem exists in its school.

Although it ultimately conceded that there was "clearly some drug use at the Tecumseh schools," [21] the Tenth Circuit

[21] Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra, 242 F.3d at 1274-1275 (Pet. App. A 17a - 19a).

apparently agreed with Respondents that the vast majority of evidence presented by the Board of Education was "hearsay" and "virtually anecdotal." The contention that members of the Board of Education, administrators and teachers have to personally witness students using drugs in order to be able to determine by their considered judgment and opinions there is a sufficient drug problem warranting a drug policy is untenable. In fact, the evidence proffered here is akin to the evidence properly considered by this Court in *Vernonia*. The wrestling coach there witnessed an injury suffered by a wrestler and various omissions of safety procedures and misexecutions by football players, which the coach believed may have been caused by drug use. Additionally, the administration's concern with the increase in disciplinary problems in general as well as educators' concerns that students were "glamorizing drugs and alcohol" led the administration and board in *Vernonia* to properly and legitimately believe that the students were abusing drugs.[22]

Moreover, since the onset of this litigation, the Board of Education acknowledged that it did not direct the program at the students who engage in interscholastic competition because they are the only students, or even the most likely students,[23] to abuse drugs. The nature of Tecumseh's concern

[22] When it attempted to target the drug problem specifically to students "subject to the testing Policy," the court of appeals found such use "vastly different from the epidemic of drug use and discipline problems among the very group subject to testing in *Vernonia*." *Id.*, 242 F.3d at 1275 (Pet. App. A 19a).

[23] In their Brief in Opposition, Respondents' statements that the "Tenth Circuit found" that "drug testing students who are least likely to use drugs" was unconstitutional (Brief in Opposition, p. 6); the "court further held" that the efficacy of addressing the drug problem of a student group "identified as the least likely to use drugs" is minimal (*Id*, pp. 6,7); the "Tenth Circuit struck down any drug testing" for students "who are the least likely to do drugs" (*Id*, p. 9); and the "Tenth Circuit's decision" that "the students tested have been identified as those not likely to do drugs"

is not based solely upon drug abuse among its students in interscholastic competition.[24] Other concerns which are equally important enough to justify the suspicionless search are clearly present. The nature of those concerns—Tecumseh's concern for the safety of the students while competing and its concern about the limited degree of supervision it can provide its students while in engaged in the Competitive Activities outside of the traditional school setting, coupled with its knowledge of drug use and its concern for deterrence and treatment—are legitimate or "sufficient" reasons for testing students in Competitive Activities.

With regard to safety, the court of appeals faulted Tecumseh because it "tests both too many" students (citing students in FHA as an example of competition where students are not in physical danger) and "too few" students (citing students who use "shop equipment" during classtime). *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra* 242 F.3d at 1277 (Pet. App. A 23a).

Tecumseh readily admits that some students engaged in interscholastic competition do not engage in the type of physical competition that endangers their safety. However, *Vernonia* does not require proof that all students covered by a drug testing program must engage in an activity where physical danger is present.[25]

(*Id*, p. 17), are distortions of the Tenth Circuit's decision in the case. The Tenth Circuit did not determine that students engaged in Competitive Activities are the least likely students to use drugs.

[24] As stated by this Court in *Von Raab, supra*, 489 U.S. at 657-658, "[t]he mere circumstances that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity."

[25] The evidence of physical danger in *Vernonia* was limited to football and wrestling. Although not mentioned in any of the *Vernonia* opinions, the policy also covers basketball, track, cross country, volleyball and golf. Brief of Petitioners at 3, *Vernonia* (No. 94-590) (filed January 12, 1995).

Aside from Athletics, which activity Respondents excluded from their challenge, Tecumseh's Policy covers seven other competitive activities. Cheerleading and Pom Pom require students to perform back flips, splits and other acrobatic moves, such as pyramiding on top of each other and dropping one student from the top of the pyramid. (J.A. 75, 76). The Policy covers Band, which requires students to perform extremely precise routines with heavy equipment and instruments in close proximity to other students. (J.A. 49). Moreover, in FFA, students are required to individually control and restrain animals as large as 1500 pounds through the use of voice commands and physical cues such as halters and show sticks. (J.A. 79, 80,118).

The court of appeals viewed these dangers no different than the risk of danger facing a student in a classroom laboratory who is under the influence of drugs. *Id.*, 242 F.3d at 1277 (Pet. App. A 23a). Contrary to that view, however, the classroom is a highly structured environment where the classroom teacher can observe each student and monitor for threats to safety. Police security, drug interdiction canines and surveillance cameras additionally support a teacher during the school day.

Although the remaining Competitive Activities—Vocal, FHA, and the Academic Team—do not present the same type of apparent physical danger as the others, these activities share a common safety thread with the other activities in the area of supervision.

While students are in competition, in transit to and from competitions, often driving their own vehicles, or relaxing in between competitions, the traditional supervision of students by Tecumseh personnel is nearly impossible. "The need for close supervision in the schoolhouse is intensified on field trips where opportunities abound to elude the watchful eye of chaperones." *Desilets v. Clearview Bd. of Education*, 627 A.2d 667, 672 (N.J. Super. A.D., 1993) ("*Desilets*").

Students who participate in Competitive Activities oftentimes practice for competitions after school hours or on weekends. These students often travel to different towns, cities and states to participate in competition, spending one, two or more nights away from home. During those times, the team coach and some volunteers are in charge of supervision of the students, but free time is available for the students to visit students from other schools and to see the sights of the city.

At least one court of appeals has recognized the problem that competition poses when it addressed the search by a school official of a Tennessee student who was competing in a band contest in Hawaii with 140 of her fellow band members. In *Webb v. McCullough*, 828 F.2d 1151, 1157 (6th Cir. 1987), the Court observed:

> "First, the trip did not involve mandated education, as it was a voluntary undertaking on the part of Webb and the other band members, just as most extracurricular activities are voluntary.
>
> . . . .
>
> "Second, a greater range of activities occur during extracurricular activities than during school. Thus, there may be a need for a greater range of intervention by an administrator than is the case when a student is only active within the relatively orderly confines of a school.
>
> "Third, there are many more ways for a student to be injured or to transgress school rules or laws during a non-curricular field trip than during relatively orderly school hours. To expose administrators and school districts to increased tort liability while denying them the authority necessary to lessen the likelihood of student injury would be inequitable and would probably decrease the range of extracurricular activities schools would offer."

Moreover, as the Court in *Desilets* observed:

> "[A] teacher confronted with a serious problem of misbehavior or injury in the schoolhouse readily has available to him or to her substantial resources to deal with the problem, such as other teachers and administrators, a school nurse, and quick access to police and ambulance services, if necessary. On the other hand, chaperones on a field trip are relatively isolated." *Desilets, supra*, 627 A.2d at 672.

The court of appeals dismissed the nature of Tecumseh's concern for limited supervision because it reasoned, first, that the general student population is not closely supervised when they are in the hallways during school hours, at lunch or when entering and leaving school. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1277 (Pet. App. A 23a-24a). Once again, the court of appeals ignored the fact that security personnel, surveillance cameras, and the entire faculty is present during those unstructured times during the school day to provide the needed support to supervise students. These supports are not available to coaches after school, on weekends or when traveling.

Secondly, the court of appeals reasoned that since three non-competitive activity organizations in Tecumseh in the last five years had traveled overnight, the nature of Tecumseh's concern could not be based on the problem posed by limited supervision of the students engaged in Competitive Activities. *Id.*, 242 F.2d at 1277. (Pet. App. A 24a). Tecumseh admits that not all students who ever spent a night in the custody of a teacher or administrator are covered by the Policy.

The nature of the District's concern is not based solely on limited supervision, nor is it based solely on safety, nor is it based solely upon drug abuse, nor is it based solely on deterrence. The nature of the concern in Tecumseh is the deterrence and hopeful elimination of drug use by that part of the student population: 1) who have not been insulated from

drug use;[26] 2) who have already voluntarily placed themselves under more stringent academic and out-of-school rules and regulations; 3) who have a lesser degree of privacy than the general student population; and 4) who, with minimum school supervision, reap the benefits of representing the school district in competitions with students from all over the country[27] and enjoy the privilege offered by the Board of Education to travel and see the world outside of Tecumseh, Oklahoma. None of the other preventative measures implemented by the Board of Education are or can be utilized for these students when they are competing off premises. Moreover, as stated by the district court, the nature of Tecumseh's concern is effectively addressed "by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs.[28]" *Earls v. Bd. of*

[26] As stated by Carolyn Daugherty, commenting about her students who have won state choir awards, "[a]nd you're going to find that a lot of those students don't do drugs, but some do. They may be intelligent but not smart." (J.A. 128). Further, Respondent James, who denied drug usage, lived in a home environment that had been invaded by drugs. (J.A. 121, 122)

[27] Respondents argued in the lower courts that the sole reason for the implementation of the Policy is purely symbolic because school officials listed the importance of representing Tecumseh in competitions as a reason for its implementation. Tecumseh admits representation is a reason, but not the only reason, for directing the Policy to students who voluntarily choose to compete.

[28] Respondents assert that students in choir and academic team are not recognized as role models, generally, in the Tecumseh schools and by testing them, other students would not be deterred from using drugs. Such a characterization is unfounded, and ignores the reality that most students are looked up to by at least a few other students within their peer group. Respondent Daniel James, who characterized himself as a "skater" and not a part of the "popular" crowd, was justifiably very proud of his participation in Life Guides, an organization that existed for the purpose of providing student role models and counselors to other students to avoid drug use. Daniel James considered himself to be a role model, even though he was not involved in athletics. (J.A. 17, 18).

Educ. of Tecumseh Pub. Sch. Dist., supra, 115 F.Supp. at 1295 (Pet. App. A 77a).

D. The Nature of Tecumseh's Concern is Sufficiently Immediate to Justify Suspicionless Testing.

The immediacy of the concern for drug usage is just as great in Tecumseh as is the nature of its concern. Respondents have argued throughout this litigation that under *Vernonia*, "immediacy" requires a sudden increase, a rebellion or an epidemic of drug usage in a public school before random drug testing can be implemented. Logically, if one were to interpret *Vernonia* as Respondents have urged, the degree of drug use required before drug testing could be implemented would be far higher for the student population with diminished Fourth Amendment rights than it would be for adults who enjoy all the rights and privileges under the Amendment.[29]

The district court astutely determined that it was not required under *Vernonia* to weigh the proportion of Tecumseh's drug problem to ascertain whether or not the problem met a standard of "epidemic" or "state of rebellion." *Id.*, 115 F.Supp. at 1285 (Pet. App. D 56a-57a). On this point, the Tenth Circuit agreed.[30] Nonetheless, the Tenth Circuit ignored the *caveat* in *Von Raab* and *Skinner* that suspicionless drug testing policies may be constitutional

[29] The crisis found by this Court in *Vernonia* "is an immediate crisis of greater proportions than existed in *Skinner*" . . . "[a]nd of much greater proportions than existed in *Von Raab*, where there was no documented history of drug use by any customs official." *Vernonia, supra*, 515 U.S. at 663.

[30] "We do not suggest that a school must wait until it can identify a drug abuse problem of epidemic proportions before it may drug test groups of its students." *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1278 (Pet. App. A 25a).

when other factors exist to justify the search and instead determined that, in any school activity a "sufficient" number of drug abusing students must be identified in that specific activity before suspicionless drug testing can be imposed. Although an "epidemic" number of students is not by definition analogous to "sufficient," "what appears to be a problem in one place might seem to be a minor annoyance elsewhere." *Acton v. Vernonia,* 23 F.3d 1514, 1519 (9th Cir.1994). Tecumseh believes if it must wait until a "sufficient" number of student drug users can be actually identified in a specific activity, its drug problem will have reached the epidemic stage.

The standard adopted by the Tenth Circuit negates deterrence of drug use, overall drug abuse, and physical and safety factors as legitimate concerns important enough to justify a suspicionless search by school officials. It requires Tecumseh and other public schools within the boundaries of the Tenth Circuit to condone drug abuse among their students of which they have knowledge through reason and common sense until a sufficient amount of students in each activity can be specifically identified as drug users by teachers and administrators. Indeed, the holding of the Tenth Circuit erroneously places "immediacy" of actual drug abuse as the sole and only factor to be considered by a school district before it can implement a suspicionless drug testing policy covering students in extracurricular activities.[31]

At the least and by its very nature, the Tenth's Circuit's "sufficiency" test forces boards of education to allow drug abuse "to gain a stronghold among its schoolchildren before it may take steps" to eliminate the problem through random

[31] Although Respondents excluded Athletics from its challenge to the Policy, the ruling of the court of appeals does not. Therefore, the inherent safety risk involved in football or wrestling is no longer a factor to be considered by a board of education in the Tenth Circuit when considering the implementation of random drug testing.

testing. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra,* 242 F.3d at 1284 (Pet. App. 38a) (Ebel, J., dissenting). *Vernonia* does not require Tecumseh to demonstrate a "fixed minimum quantum of governmental concern" of drug abuse before it can implement its Policy, as the Tenth Circuit decision now requires.

In reality, the immediacy of deterring drug use in Tecumseh by drug testing should have been addressed long before the implementation of the Policy. Through reason and common sense, the existence of drug abuse in Tecumseh is uncontroverted.

Vernonia should not and cannot be read to require Tecumseh to wait even longer than it already has to ensure the health and safety of its students who engage in Competitive Activities.

CONCLUSION

Tecumseh implemented its Policy in a continuing effort to deter and eliminate drug use among its students. Due to the knowledge and awareness of overall drug use among its students by the Board of Education, its administrators, teachers, and the patrons within its community, a logical solution would have been to apply the Policy to the entire student population, an application that no doubt a majority of Tecumseh and other school officials, educators and parents would readily condone. However, Tecumseh realizes it cannot deny students their right to a free public education if they choose to engage in substance abuse. It has therefore spent precious resources to implement numerous anti-drug measures in an attempt to reach the entire student population, knowing full well that it has not been enough to eliminate the scourge of student drug abuse.

Our society and our courts consistently grant local school officials great deference to formulate rules to ensure the safety and well being of school children. The Policy is such a rule. Although the Policy does not apply to all children for

whom Tecumseh has a duty to maintain health and safety, it applies to those students who voluntarily choose to take advantage of those additional opportunities which, in turn, increase and magnify the responsibilities of Tecumseh school officials who voluntarily choose to afford their students those opportunities.

The Policy is designed to deter students from using drugs and to help those students who engage in drugs get treatment. The Policy is not criminal in nature. It is not punitive. It does not even rise to a disciplinary measure for those students who agree to seek help after a first-time positive result. It does, however, provide the parents of the other students who wish to compete with the comfort of knowing that after regular school hours, and while in the custody of school officials, their children are protected to the extent possible from students who choose to continue to engage in drug abuse.

Tecumseh's Policy covering students in interscholastic competition is a rational and reasonable extension of the Board of Education's efforts to help its students stay away from and treat drug abuse among that part of the student population for which it has a heightened responsibility for care and safety.

Respectfully submitted,

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